

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

LEOPOLD & BUZZFEED, INC.,

Plaintiffs,

v.

U.S. DEPARTMENT OF JUSTICE *et al.*,

Defendants.

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) Civil Action No. 19-cv-1278
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SECOND DECLARATION OF DAVID M. HARDY

(1) I am the Section Chief of the Record/Information Dissemination Section (“RIDS”), Information Management Division (“IMD”), in Winchester, Virginia. I have held this position since August 1, 2002. Prior to my joining the Federal Bureau of Investigation (“FBI”), from May 1, 2001 to July 31, 2002, I was the Assistant Judge Advocate General of the Navy for Civil Law. In that capacity, I had direct oversight of Freedom of Information Act (“FOIA”) policy, procedures, appeals, and litigation for the Navy. From October 1, 1980 to April 30, 2001, I served as a Navy Judge Advocate at various commands and routinely worked with FOIA matters. I am also an attorney who has been licensed to practice law in the State of Texas since 1980.

(2) In my official capacity as Section Chief of RIDS, I supervise approximately 243 employees, supported by 75 contractors, who staff a total of twelve Federal Bureau of Investigation Headquarters (“FBIHQ”) units and three field operational service center units whose collective mission is to effectively plan, develop, direct, and manage responses to requests for access to FBI records and information pursuant to the FOIA as amended by the OPEN

Government Act of 2007, the OPEN FOIA Act of 2009, and FOIA Improvement Act of 2016; the Privacy Act of 1974; Executive Order 13526; Presidential, Attorney General, and FBI policies and procedures; judicial decisions; and Presidential and Congressional directives. The statements contained in this declaration are based upon my personal knowledge, upon information provided to me in my official capacity, and upon conclusions and determinations reached and made in accordance therewith. This declaration incorporates my first Declaration filed August 27, 2019 at ECF 25-5, Declaration of David M. Hardy.

(3) Due to the nature of my official duties, I am familiar with RIDS resources, the procedures followed by the FBI in responding to requests for information from its files pursuant to the provisions of the FOIA, 5 U.S.C. § 552, and the Privacy Act, 5 U.S.C. § 552a, (collectively “FOIPA”) and efforts to improve efficiency within RIDS. I am also familiar with the files of the Special Counsel’s Office (“SCO”) that are maintained in the FBI’s Central Records System.

(4) In relation to the above-captioned lawsuit against the Department of Justice (“DOJ”) and its components including the FBI, involving a request seeking all records of the SCO, this Court ordered the Defendants to address the following:

(1) the number of individuals in each of the several components of the Department processing documents responsive to requests made pursuant to the FOIPA;

(2) the total number of cases brought pursuant to the FOIPA against the Department pending before other members of this Court and other federal district courts that are also being addressed by the components of the Department that are

also processing the FOIPA requests made by the Plaintiffs in the above captioned matters; and

(3) the steps, if any, taken by the Department to request additional funding from Congress for the purpose of hiring additional personnel to assist in the processing of documents responsive to FOIPA requests.

See ECF 33, Order (Oct. 3, 2019).

(5) In addition to responding to these three topics specifically, I have included additional contextual information about the FBI's FOIPA program, which handles tens of thousands of FOIPA requests for millions of pages of sensitive national security and law enforcement records annually.

(1)

NUMBER OF INDIVIDUALS PROCESSING FOIPA REQUESTS

(6) As noted above, RIDS employs 243 Federal employees and 75 contractors located in four geographic locations who are responsible for all aspects of responding to FOIPA requests received by the FBI.

(7) Not all RIDS employees/contractors handle all aspects of processing. Rather, a single FOIPA request is touched by multiple employees responsible for different aspects of the process, including initial reviews to ensure that requests meet all requirements, searches, responsiveness reviews, classification reviews, reviews for FOIA exemptions, and quality control/supervisory review.

OTHER PERSONNEL PROVIDING SUPPORT TO THE FOIPA PROGRAM

(8) The FBI's Office of the General Counsel (OGC), FOIA Litigation Unit (FLU) also supports the FBI's FOIPA program by serving as agency counsel in all litigation against the FBI and/or implicating FBI records and equities. In this capacity, FLU personnel review records

processed in response to FOIPA requests that are in litigation in order to assist in defending the FBI's positions in those cases. FLU employs 7 Federal employees.

(9) In addition to RIDS and FLU, employees in various FBI operational and support divisions serve as subject matter experts (SMEs) with regard to information contained in FBI records that are processed in response to FOIPA requests. These employees assist in various aspects of FOIPA request processing, from conducting or advising on searches for responsive records to reviewing records processed in response to FOIPA requests to ensure that all agency equities are adequately addressed to providing expert advice and guidance to assist FOIPA personnel in understanding the records and sensitivities of them. The employees available to provide such assistance vary depending on the nature and subject matter of any particular request.

THE FBI FOIPA PROGRAM BY THE NUMBERS

(10) In FY2019, the FBI received 31,344 FOIPA requests (a 78% increase over intake from 5 years ago, when in FY2014, intake was 17,653 requests).

(11) Correspondingly, the volume of pending requests has also increased. At the end of FY2019, the FBI had 8,691 pending FOIPA requests, and roughly 8.67 million pages had been imported into the FBI's FOIA Document Processing System for processing,¹ when at the end of FY2014, the number of pending requests was 4,250.

(12) In FY2019, the FBI resolved 31,962 FOIPA requests and reviewed over 1 million pages of records in response to FOIPA requests.

¹ This number does not include the vast majority of the pages responsive to Plaintiff's requests for SCO records, since not all of those have been imported yet due to the volume and burden of that undertaking. This number also does not account for the contents of digital media that may be responsive to FOIPA requests pending processing, including the thousands of digital media devices from the SCO files.

(13) With respect to the SCO records specifically, RIDS has designated a single, specialized team of Government Information Specialists (GIS) to handle requests for SCO and SCO-related records. That team currently has 23 GIS employees. Additionally, three FLU attorneys (half of the Unit's attorney staff) are handling lawsuits involving SCO and SCO-related records. Finally, a small but varying number of SMEs are assisting in the review of SCO and SCO-related records², depending on the particular records at issue.

(2)
NUMBER OF FOIA LITIGATION CASES PENDING AGAINST THE FBI
WHERE RECORDS ARE BEING PROCESSED

(14) Concurrently with the significant increase in the number of FOIPA requests received by the FBI, the number of FOIA lawsuits brought and pending against the FBI has increased as well. Indeed, since 2012, the number of pending FOIA lawsuits against the FBI has increased by more than 100%. In FY2019, the FBI received 151 new FOIA lawsuits (or approximately three new cases every week).

(15) The FBI has 344 pending FOIA lawsuits as of today; these include cases brought directly against the FBI and cases against other agencies that involve FBI records which have been processed following consultation requests or referrals. Of these, 17 cases were filed by Plaintiff, 15 of which were filed by Leopold/Buzzfeed, including this one, and two of which were filed by CNN, including this one.

(16) Of these, approximately 234 cases are pending in the District of Columbia (either before the District Court or the Circuit Court).

² The number of SMEs varies pending on the particular records and subjects at issue. Nevertheless, this is a necessarily limited universe of personnel, due to the knowledge and expertise required and also given their other duties and responsibilities to conduct or provide operational support on on-going FBI investigations and enforcement/intelligence-gathering activities.

(17) The FBI is processing records making interim releases of non-exempt records in 49 of the pending FOIA lawsuits. The FBI is processing over 22,000 pages per month on a rolling basis in these 49 cases. Of these 49 cases, 42 of them have production rates of 500 pages/month; 25 of these cases are pending before the District Court for the District of Columbia.

(18) One of Leopold/Buzzfeed's cases is currently being processed at 500 pages/month. The FBI is conducting supplemental searches in another of Leopold/Buzzfeed's cases that will likely result in some additional processing/record production.

(19) As of today, roughly 25% of RIDS's resources are devoted to FOIPA requests in litigation, even though such requests amount to only a minute percentage (approximately 1%) of the FOIPA requests processed by RIDS.

(20) Approximately 70% of RIDS's SCO team's workload involves requests in litigation.

(21) For every resource devoted to processing records in FOIA lawsuits,³ fewer pages can be processed for requesters whose requests are pending at the administrative stage. Thus, the general public's access to FBI records is being impeded by the interests of the few who have the ability to litigate their cases (which effectively allows them to "cut the line" and block everyone else's access).

³ Many of the lawsuits brought against the FBI are initiated on or shortly after the 20 work-day statutory deadline for responding to FOIA requests, despite the fact that they involve thousands, tens of thousands, or hundreds of thousands of pages, if not more, of highly sensitive national security and law enforcement records and cannot conceivably be processed within 20 days.

(3)

**STEPS TAKEN BY DOJ TO REQUEST ADDITIONAL FUNDING FROM CONGRESS TO HIRE
ADDITIONAL PERSONNEL TO ASSIST IN PROCESSING FOIA REQUESTS**

(22) DOJ, and not the FBI, makes budget requests to Congress. Accordingly, the FBI cannot directly respond to any steps that the Department may have taken to obtain additional funding Congress to hire personnel to assist in processing FOIA requests. However, the FBI is working vigorously to address the resource issue internally.

(23) In an effort to respond to the 78% increase in new requests received since 2014, RIDS sought and received funding within the FBI to hire contractors to assist in the FOIA process.

(a) In 2015, RIDS received funding for 33 contractor positions. Additional funding was received in 2016 and 2018, so that RIDS currently has 75 contractor positions.

(b) The addition of the contractor positions has increased the human resources of the FBI's FOIPA program by 30%.

(c) For FY2020, the FBI has identified funding for additional contractor positions for RIDS to assist in processing FOIPA requests, and is working to reallocate additional Federal employee positions to the program.

(24) Increasing contractor staff requires significant effort to recruit, hire, and train new contractors. In addition, the FBI must provide cleared facilities and provide the necessary infrastructure for them to be effective.

(a) In order to accommodate the new contractors, the FBI expanded its FOIPA operation in Savannah, Georgia, and established a new office in Pocatello, Idaho.

(b) Additionally, RIDS has a robust training protocol and program for personnel processing FOIPA requests, given the considerable analytical skills necessary to

perform the job successfully. FOIPA processing at the FBI is complex, in light of the various FBI systems that an employee needs to learn and master; the nature, substance, and sensitivities of the records that must be processed; and the law enforcement and national security interests at stake. It takes six to nine months, at least, to successfully acquire the minimum skills required to be an effective analyst. The average time to qualify as a certified FBI FOIPA analyst is 2½ years.

(c) Accordingly, the benefits of adding additional contractor positions was not evident until FY2019, when the FBI reviewed over 1 million pages of records and reduced its backlog to 8,691 requests, despite receiving over 31,000 new requests.

(25) While the additional of contractor resources has benefitted the FBI's FOIPA program, the traditional approach of adding human resources to resolve the long-term challenges faced by the program is not a viable permanent solution.⁴ The FBI's strategic approach to meeting these challenges is built on capitalizing on the efficiencies that can be gained through digitalization of FBI FOIPA requests, allowing the requests to be processed using machine learning and predictive redaction. This will reduce much of the current manual processing in use today. The FBI is in its second year of a five year development/business process re-engineering for its FOIA processing technology. To my knowledge, the FBI is the first federal agency to embark on this course.

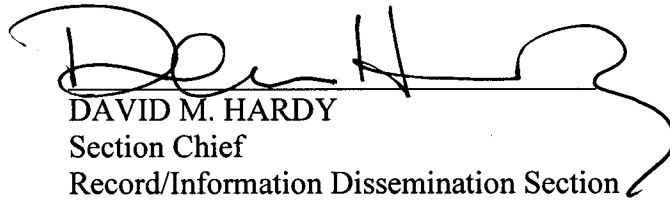
(26) The new system's development is parallel to the completion of the FBI's new Central Records Complex (CRC) in Spring 2020. The CRC will house all FBI closed paper files. With automated file retrieval, scanning documents, and electronic forwarding of records, the

⁴ The long-term challenges faced by the program include increasing numbers of requests and lawsuits, and increasing complexity and volumes of responsive records that must be processed.

CRC will eliminate the movement of paper in the FBI's FOIPA process. This will speed processing and facilitate digitization of records.

Pursuant to 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed this 12th day of November, 2019.



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